IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1613

EASTERN CENTRAL MOTOR CARRIERS ASSOCIATION, INC.
MIDDLE ATLANTIC CONFERENCE
NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC.
NEW ENGLAND MOTOR RATE BUREAU, INC.
NIAGARA FRONTIER TARIFF BUREAU, INC.
ROCKY MOUNTAIN MOTOR TARIFF BUREAU, INC.,

Petitioners,

v.

INTERSTATE COMMERCE COMMISSION
AND UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Of Counsel:

REA, CROSS & AUCHINCLOSS
700 World Center Building
918-16th Street, N.W.
Washington, D.C. 20006

BRYCE REA, JR.
DAVID H. COBURN
918-16th Street, N.W.
Washington, D.C. 20006
(202) 785-3700

Counsel for Petitioners

May 11, 1978

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TABLE OF CASES

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above case on February 21, 1978.

CITATION TO OPINIONS BELOW

The February 21, 1978 order of the Court of Appeals appears in Appendix A, but is not yet reported. The March 30, 1978 order of the Court of Appeals denying rehearing appears in Appendix B but is not reported. The March 19, 1974 Initial Report and Order of the Interstate Commerce Commission (Commission) in Ex Parte No. MC-77 (Sub-No. 1), *Restrictions on Service by Motor Common Carriers (Compliance Reports & Interpretations)* which the Court of Appeals upheld appears in Appendix C and is reported at 119 M.C.C. 691 (1974). The Report and Order of the Commission on reconsideration of that proceeding appears in Appendix D and is reported at 126 M.C.C. 303 (1977).

JURISDICTION

The judgment of the Court of Appeals was entered on February 21, 1978. The order of the Court of Appeals denying Petitioners' petition for rehearing was entered on March 30, 1978. This Court has jurisdiction under Section 2350(a) of Title 28 of the United States Code.

QUESTION PRESENTED

When enacting the Interstate Commerce Act, Congress specifically chose not to vest the Interstate Commerce Commission with authority to require the establishment of through routes among motor common carriers of property — i.e., arrangements between carriers for the continuous carriage of goods from points on the line of one carrier to points on the line of another carrier at rates embracing the entire movement. The question posed here is:

Whether the Commission exceeded its statutory jurisdiction in a manner specifically proscribed in *Thompson* v. *United*

States, 343 U.S. 549 (1952), when it established new through routes among motor common carriers under the guise of requiring that existing through routes be reasonable?

STATUTORY PROVISIONS

The statutory provisions involved in this case are cited below and set forth in Appendix E. They are:

The Interstate Commerce Act:

Section 15(3), 49 U.S.C. § 15(3)

Section 204(a)(1), 49 U.S.C. § 304(a)(1)

Section 216(a), 49 U.S.C. §316(a)

Section 216(c), 49 U.S.C. §316(c).

Regulations of the Interstate Commerce Commission:

49 C.F.R. §1307.27(k)(1)

STATEMENT OF FACTS

A through route is an arrangement whereby connecting carriers hold themselves out to perform continuous carriage of goods from an origin on the line of one to a destination on the line of the other. A joint rate is a single rate established jointly by the carriers party to a through route covering the carriage of goods from origin to destination and is the most common evidence of a through route arrangement. Through routes are also evidenced by the joint and several liability of each carrier for loss and damage to shipped goods.

Whereas the Interstate Commerce Act vests in the Commission authority to mandate through routes and joint rates among railroads, water carriers, and motor common carriers of passengers, Section 216(c) of the Act provides only that "Common carriers of property *may* establish through routes and joint rates, charges and classifications with other such carriers. . . ." Compare Sections 15(3), 216(a) and 307(d) of the Act, 49 U.S.C. §§ 15(3), 316(a), 907(d).

Employing the discretion vested in them by Section 216(c), carriers have, for the past 40 years, filed common tariffs which establish a nationwide network of through route service involving two carriers. The joint rates applied to this two-carrier service are pegged to the same level as the rates generally applied to the shipment of all commodities between all points in single-line service -i.e., the class rates. On the other hand, the common tariffs of the carriers generally do not provide for through routes and joint rates when the carriage of a shipment is performed by three or more carriers. Carriers will and do handle such traffic, but on the basis of a combination of single-line services and rates.

On March 3, 1970, the Interstate Commerce Commission issued its report and order in a proceeding styled Ex Parte No. MC-77, *Restrictions on Service by Motor Common Carriers,* 111 M.C.C. 151 (1970). In order to eliminate provisions in the tariffs of motor common carriers of property which the Commission believed limited ". . . service on small shipments and on traffic that either originates at or is destined to points in rural or relatively inaccessible areas," 111 M.C.C. 153, the Commission adopted a rule providing, in part, that:

> ". . . No provision may be published in tariffs, supplements, or revised pages which results in restricting service to less than the carrier's full operating authority or which exceed such authority." 49 C.F.R. § 1307.27(k)(1).

Without further notice, the Commission issued, on March 19, 1974, its first decision in Ex Parte No. MC-77 (Sub-No. 1), *Restrictions on Service by Motor Common Carriers (Compliance Reports and Interpretations),* 119 M.C.C. 691 (1974), wherein are set forth "additional actions" ordered by the Commission to achieve compliance with the above rule. The principal of those actions was an order requiring the cancellation of tariff provisions that limited the number of motor common carriers that participate in through routes and joint

rates. (Pet. App., p. C-14). As modified on reconsideration, the Commission required that carriers expand their through routes and joint rates to embrace hauls by three carriers. (Pet. App., pp. D-20, D-24).

Petitioners are associations through which motor common carriers of property collectively establish the rates and classifications published in their common tariffs pursuant to agreements approved by the Commission and thereby immunized from the antitrust laws under Section 5a of the Act. On May 5, 1977, Petitioners, acting on behalf of their carrier members, filed for judicial review of the Commission's order in the United States Court of Appeals for the Fourth Circuit. Jurisdiction in the Court of Appeals was founded on Section 2342(5) of Title 28 of the United States Code, 28 U.S.C. § 2342(5), which empowers United States Courts of Appeals to review Commission orders. Venue in that Court was founded on Section 2343 of Title 28 of the United States Code, 28 U.S.C. § 2343. On August 22, 1977, the Court of Appeals stayed the effectiveness of the Commission's order pending completion of judicial review.

Petitioners argued to the Court of Appeals, as they had to the Commission, that the order in Ex Parte No. MC-77 (Sub-No. 1) exceeded the Commission's statutory authority by mandating the establishment of through routes which do not now exist. By decision issued February 21, 1978, Senior Circuit Judge Bryan, speaking for a unanimous panel, affirmed the Commission's finding as follows:

> "As the Commission urges, it has not decreed through routes or joint rates; it has only obeyed the fiat of the Congress that it insist that those established by the carriers be reasonable, as witness the Act in Section 204(a)(1), 49 USC 304(a)(1):
>
> " '(a) It shall be the duty of the Commission— (1) To regulate common carriers by motor vehicle as provided in this chapter, and to that end the Commission may *establish reasonable requirements with respect to continuous and adequate services* . . . .' (Accent added)." (Pet. App., p. A-2).

By order filed March 30, 1978, the Court of Appeals denied the petition for rehearing and suggestion for rehearing en banc filed by Petitioners. (Pet. App., p. B-1). However, by order of April 11, 1978, the Court of Appeals stayed its mandate pending the filing of this petition.

REASONS FOR GRANTING THE WRIT

I

The Commission Contravened *Thompson* v. *United States* and Distorted the Interstate Commerce Act

The Commission's order "accomplish[es] indirectly what Congress has not chosen to give it authority to accomplish directly." *T.I.M.E., Inc.* v. *United States*, 559 U.S. 464 (1969). What the Commission cannot do directly is establish through routes among motor common carriers of property. But the Commission's order itself belies the contention that the Commission has not circumvented this limit on its authority.

Posit three carriers, A, B, and C, each holding certificates of public convenience and necessity from the Commission for the movement of commodities over routes embracing different origins and destinations. Carrier B shares a point of interchange with Carrier A and maintains a through route with Carrier A for the transportation of goods from origins on Carrier A's route to destinations on Carrier B's route at joint rates.[1] Carrier B shares another point of interchange with

[1] A point of interchange is no more than a point common to the lines of both carriers at which traffic is exchanged between them.

Carrier C, and likewise maintains a B-C through route. Posit further that each of the three carriers maintains a provision in their common tariff establishing through routes involving no more than two carriers. A typical provision reads as follows: "Unless otherwise specifically provided, joint routes will not apply for joint hauls via more than two carriers."

By ordering the substitution of "three" for "two" in this provision, the Commission established a through route not before available. It established a through route for the movement of traffic originating on Carrier A's line over Carrier B's line to a destination on Carrier C's line.

But, the Commission argues that it has not created this new through route and it hinges this conclusion on the proposition that carriers have taken the initial "affirmative action" of "voluntarily . . . entering into joint or interline arrangements" with one other carrier and "having made that choice, they are bound by rules of interpretation or administration that the Commission formulates." (Pet. App., p. D-15). The Commission thus argued to the Court of Appeals that the A-B-C through route can be "constructed" on the basis of the existing points of interchange named in the common tariffs which connect the routes of these three carriers. The Commission's order, it was urged to the Court of Appeals, merely makes this through route "operational."

The proposition that the Commission can exercise its regulatory authority by "constructing" through routes based on points of interchange already stands rejected by this Court as an "unwarranted distortion of the statutory pattern" governing the Commission's authority with respect to through routes. *Thompson* v. *United States,* 343 U.S. at 549, 559. Also see *Denver and Rio Grande West R. Co.* v. *Union Pac. R. Co.,* 351 U.S. 321 (1956). In *Thompson, supra,* the Missouri Pacific Railroad transported grain on its own lines from Lenora, Kansas, to Omaha and Kansas City, both about the same distance from Lenora. At Concordia, Kansas, a point between Lenora and

Omaha, its line connected with the Omaha Line of the Chicago Burlington & Quincy. The Omaha Grain Exchange complained to the Commission that it was being discriminated against because the rates from Lenora to Omaha were higher than the rates from Lenora to Kansas City. It asked the Commission to require the Missouri Pacific to reduce the rates. The Commission found that there was an existing through route between Lenora and Omaha over the lines of the Missouri Pacific and the Burlington, with an interchange at Concordia. It then found that the combination of local rates from Lenora to Concordia and from Concordia to Omaha were unreasonably high to the extent they exceeded the rates to Kansas City and ordered them reduced. By "constructing" this through route based on the physical interchange of the railroads, the Commission avoided the limit on its authority to establish through routes between railroads when such routes would result in a railroad short-hauling itself. See Section 15(4) of the Act.

Mr. Chief Justice Vinson, speaking for a unanimous Court, found that "the Commission's efforts to support its finding that a through route . . . already exists are inconsistent with the meaning of the term 'through route' as used in the Interstate Commerce Act." 343 U.S. at 560. Rather, he held that the test of a through route is whether carriers "hold themselves out as offering through transportation service." 343 U.S. at 557. Applying that test, Chief Justice Vinson found that "there [was] no evidence that any through transportation service [had] ever been offered from Lenora to Omaha via the Burlington . . ." and that:

> "[t]he fact that appellant's line connects with the Burlington at Concordia does not aid the Commission in proving the existence of a through route since the power to establish through routes . . . also presupposes such physical connection." 343 U.S. at 557-558.

Here, as in *Thompson,* the mere physical connection, the sharing of commonly designated points of interchanges be-

tween Carriers A, B, and C, does not evidence a through route. On the contrary, the designation of interchange points is no more than the process of naming points at which traffic is interchanged. Whether it is to be interchanged in through route service or in a combination of single-line service can only be determined with reference to other tariff provisions.

Here, as in *Thompson,* there is no evidence that the carriers "hold themselves out as offering" through transportation service via three lines. On the contrary, the tariff provisions ordered modified by the Commission dispositively prove that carriers have chosen not to "hold themselves out as offering" three-carrier through transportation service.

Here, as in *Thompson,* the Commission has avoided a limit on its statutory authority to establish through routes by concluding that through routes already exist. That conclusion failing the test set forth in *Thompson,* the order here warrants review on the ground that it marks a bold usurpation by the Commission of powers withheld by Congress.

The reliance by the Court of Appeals on the Commission's authority, derived from Section 204 of the Act and *McLean Trucking Co.* v. *United States,* 356 F. Supp. 349 (M.D. N.C. 1972) aff. 409 U.S. 1121 (1973), to regulate the reasonableness of carrier through route practices marks an unfortunate effort to justify the circumvention of the Act. Nothing in Section 204, which merely authorizes the Commission to regulate motor common carriers within "the limits of the regulatory system of the Act which it supplements," can authorize the exercise of regulatory authority withheld by Section 216(c). *American Trucking Ass'n.* v. *United States,* 344 U.S. 298, 313 (1953).

Nothing in the *McLean* case can justify the Commission's order.[2] The question there was whether the Commission's

[2] Oddly, the Court of Appeals found that *McLean* "distinguished explicitly and precisely the power of the carriers under Section 216(c) of the Act and the Commission's right of regulation by virtue of Section 304(a)(1) [204(a)(1)]." (Pet. App., p. A-3). In fact, *McLean* did not even address the Commission's authority under Section 204 of the Act.

explicit authority under Section 216(g) to suspend and investigate the reasonableness of newly proposed tariff provisions embraced authority to suspend and investigate a proposal to cancel a concededly existing through route voluntarily established under Section 216(c). The Court held that it did. That holding has no bearing on this case, for a holding that the Commission has authority to determine the reasonableness of existing through routes cannot be read to empower the Commission to require through routes to be established.

II

The Impact of the Commission's Statutory Excess is Substantial

The significance of the Commission's assumed power over railroad through routes in *Thompson* was substantial for it meant that ". . . Congress' insistence on protecting carriers from being required to short haul themselves could be evaded whenever the Commission chose to alter the form of its order . . . ." 343 U.S. at 559-560.

The logical conclusion of the Commission's theory here will result in no less an undermining of Congressional prerogatives. Congress denied the Commission authority to establish through routes among motor common carriers of property for reasons acknowledged by the Commission:

> ". . . The operation of such carriers differs in many important respects from railroad operation. Many of them render a specialized service in the transportation of a limited number of commodities; some of them operate over irregular routes between points within a territory, rather than over regular routes between specified points; and there is a striking lack of uniformity in the types of equipment they operate, in their financial responsibility, and in their ability to provide service. Undoubtedly, Congress legislated

with respect to motor common carriers of property in light of these well known facts and accordingly made it clear that such carriers were not required to establish joint rates and through routes." (*Hausman Steel Co.* v. *Seaboard Freight lines, Inc.*, 32 M.C.C. 31, 36 (1942).) Also see remarks of Senator Wheeler, 79th Cong. Rec. 5655 (1935).

By making "operational" through routes which motor common carriers of property have chosen not to make available, the Commission's order results in the precise problems Congress chose to avoid when it vested through route decisions in the hands of the carriers. Thus, carrier managerial discretion has been exercised for 40 years now in a manner which limits existing through routes to those which are economical and necessary. Carriers' class rates are based on the cost of carrying shipments in single-line service and in joint-line service by not more than two carriers. Carriers offer through route-joint rate service with due regard for the overriding fact that the transfer of a shipment between carriers increases the cost of carrying it from its origin to its destination. Revoke managerial discretion and replace it with Commission regulation establishing three-carrier through routes and the cost of service will increase without any corresponding increase in revenues.

Likewise, carriers have used their discretion to limit their through route arrangements to those carriers with which they are familiar — e.g., with financially solvent and responsible carriers. Revoke that discretion in favor of Commission regulation establishing three-carrier through routes and carriers will be forced to share joint and several liability for lost and damaged goods with other carriers of unknown or questionable responsibility.

The negative economic impact of three carrier hauls is incalculable. Jeopardized by the increased costs and exposure to liability which accompany the Commission's order are the approximately 25 percent of all carrier revenues currently

earned as a result of two-line hauls. The impact is incalculable in other respects too, for the Commission's assumption of authority to establish motor common carrier through routes foretells further regulatory excesses of the same kind. Indeed, the Commission's reliance in this case on the generalized grant of regulatory authority embodied in Section 204 of the Act leaves wholly undefined the boundaries of the Commission's powers. Only the intervention of this Court can restore the boundaries established by Congress.

PRAYER

Petitioners submit that the foregoing establishes the presence of "special and important" reasons for granting this petition.

Wherefore, Petitioners pray the Court to issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit to review its decision in this case.

Respectfully submitted,

BRYCE REA, JR.
DAVID H. COBURN
918 - 16th Street, N.W.
Washington, D.C. 20006
(202) 785-3700

Counsel for Petitioners

OF COUNSEL:

REA, CROSS & AUCHINCLOSS
700 World Center Building
918 - 16th Street, N.W.
Washington, D.C. 20006

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